INDEX

CITATIONS

420419—57——1

Cases—Continued

Cases—Continued

Statutes, Rules, and Regulations:

Miscellaneous—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 521

ANDREW R. MALLORY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the court below (R. 111–118) are reported at 236 F. 2d 701.

JURISDICTION

The judgment of the Court of Appeals was entered on June 28, 1956 (R. 119). The petition for a writ of certiorari was filed on July 28, 1956, and was granted on October 22, 1956 (R. 119). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner's confession of rape, orally made after 6½ hours' detention (during which three

suspects were being investigated, and during which petitioner, one of the three suspects, was initially questioned less than 45 minutes and later questioned 90 minutes in the course of a polygraph examination) and reduced to writing soon thereafter, was inadmissible in evidence under the *McNabb* rule.

2. Whether petitioner's express consent to search, given to officers immediately following a voluntary confession, was invalid.

3. Whether the trial judge committed reversible error in explaining to an inquiring jury why he could give it no assurance that petitioner would legally be imprisoned for the rest of his life.

RULES AND STATUTES INVOLVED

Rule 5 (a) of the Federal Rules of Criminal Procedure provides:

> (a) *Appearance Before the Commissioner.* An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

31 Stat. 1322 (1901), as amended, 22 D. C. Code § 2801 (1951), provides:

> Whoever has carnal knowledge of a female forcibly and against her will, or carnally knows and abuses a female child under sixteen years

of age, shall be imprisoned for not more than thirty years: *Provided,* That in any case of rape the jury may add to their verdict, if it be guilty, the words "with the death penalty," in which case the punishment shall be death by electrocution: *Provided further,* That if the jury fail to agree as to the punishment the verdict of guilty shall be received and the punishment shall be imprisonment as provided in this section.

STATEMENT

A one-count indictment, returned May 3, 1954 in the United States District Court for the District of Columbia, charged petitioner with the crime of rape in violation of the District of Columbia Code § 22–2801 (1951) (*supra,* p. 2) (R. 1). On June 21, 1955, after being found competent to stand trial,[1] petitioner was tried by jury (R. 8, 16). The jury found petitioner guilty and added to its verdict a direction that the death penalty be imposed (R. 108). The Court of Appeals affirmed the conviction, Judge Bazelon dissenting (R. 111–118).

1. At trial, the following facts were adduced:

The complaining witness, a Mrs. Stella O'Keane, was raped by a masked assailant at about 6 p. m. on

[1] In July 1954, two psychiatrists had expressed the opinion that petitioner was incompetent to stand trial (R. 2, 4–5). Petitioner was committed by the court to St. Elizabeth's Hospital for observation on December 9, 1954 (R. 5). On February 24, 1955, the Acting Superintendent certified that, as a result of examinations by several qualified psychiatrists on the medical staff of the hospital, it had been concluded that petitioner was mentally competent to understand the proceedings against him and properly assist in his own defense (R. 5–6).

April 7, 1954, in the furnace room in the basement of the apartment house where she lived (R. 16–19). The janitor's quarters were also in the basement. Petitioner, a half-brother of the janitor, had for some six weeks prior to the time of the rape been living there together with the janitor and his family, which included a wife, two grown sons, and a younger son (R. 77).

At about 5:50 p. m. on the evening of the crime, Mrs. O'Keane went down to the basement to wash clothes (R. 17). When she found a hose so tightly attached to the faucet of the sink that she could not uncouple it, she knocked on the door of the janitor's apartment seeking help (R. 18). Petitioner, who was at the time alone in the apartment (R. 78), responded, detached the hose for her, and reentered the apartment (R. 18). A few minutes later, while in the drying room of the basement, Mrs. O'Keane glanced around to see her assailant, a man with a handkerchief tied over his face (R. 19). She was able to determine only that he was a Negro with bright eyes, that he wore a high, slouch hat, and that he was tall; this general description fitted petitioner and his two nephews (R. 19, 20, 21). When Mrs. O'Keane screamed, she was choked and thrown to the floor. Her next recollection was that of being dragged to the furnace room, where the offense took place (R. 19). She testified that, prior to the time she first saw her assailant, she had heard no one descend the wooden steps which were the only means of entry into the basement from the interior of the apartment house.

Petitioner and one of his two grown nephews left the apartment house shortly after the commission of the crime (R. 83, 111). Petitioner was found and arrested the next day, April 8, at about 2:30 p. m. (R. 21). He was taken to police headquarters, arriving at about 3 p. m. (R. 21). Because the Sex Squad office was being used at this time, petitioner was taken to the Identification Bureau (R. 22) and questioned, according to his testimony,[2] around "30 or 45 minutes, between 30 and 45 minutes" (R. 87). Thereafter, he spent the rest of the afternoon just sitting together with his two nephews in the Sex Squad office at headquarters (R. 47–49, 64, 67, 88, 89). His brother was also present for at least part of the time (R. 87, 88). The three men (petitioner and his nephews) agreed to take lie detector tests at about 4 p. m. (R. 53, 66, 88). While a call went out to locate the officer in charge of the polygraph examinations, food and drink were served to the three (R. 52, 58, 66, 91). Beginning at about 6 p. m., the officer examined the men one after another, the two nephews first (R. 69). Shortly after 8 p. m., the officer began the polygraph examination of petitioner (R. 60, 69). At about 9:30 p. m., petitioner admitted his guilt, expressing remorse (R. 61) and describing in detail what had occurred (R. 70–71). Thirty minutes later, after he had repeated his oral confession to officers of the Sex Squad (R. 32–33, 41), the police attempted, without success, to reach the United States Commissioner in order to ar-

[2] The police fixed the time of questioning as approximately 15 to 30 minutes (R. 25, 58).

raign petitioner (R. 52). At 10:45 p. m., petitioner was, with his permission, examined by the deputy coroner (R. 53). The coroner testified that petitioner was in good physical condition—that there were no marks of injury on his person. The coroner further testified that petitioner told him that he had been treated well—that he felt "O. K." and had no complaints to make except for a slight cold; that he had not been struck or threatened or promised anything other than a fair break; that he had been given food, drink, chewing gum, and cigarettes (R. 54). The coroner further testified that petitioner was alert at the time, and, as far as he could determine, of sound mind (R. 55). After the examination, petitioner was confronted by Mrs. O'Keane, the complaining witness, in whose presence he repeated his confession (R. 27, 33, 42). Between 11:30 p. m. and 12:30 a. m., he dictated his confession to a police department typist (R. 43, 55–57). The typewritten document was introduced in evidence at the trial. It recited that petitioner, upon returning to the janitor's quarters after helping Mrs. O'Keane with the laundry equipment, changed his clothes, tied a handkerchief over his face, went back out into the basement proper, and assaulted her. Petitioner was arraigned on the following morning, April 9 (R. 64).

Immediately after petitioner signed the confession, he told officers, in answer to their inquiry, that the clothing he had worn at the time of the rape was in the janitor's apartment. He offered to take the police there, signed a written statement giving his permission to them to go to the apartment and recover item-

ized articles (R. 34–36), and did in fact accompany them there and point out the garments (R. 43–44).

Petitioner's testimony at the trial disclaimed knowledge of anything that happened on the day of the confession from 6:30 p. m. until the following morning. He attributed this lapse of memory to something put in the food and drink given him (R. 90).

2. The trial judge charged the jury, *inter alia*, that if it found petitioner guilty, it had the function under the statute of determining whether or not the death penalty should be imposed, but that if it did not unanimously agree to such penalty, petitioner would be subject to imprisonment imposed by the court, and that the jury had the right to consider any circumstance or weigh any considerations in reaching a conclusion as to whether the death penalty should or should not be imposed (R. 105). At the conclusion of the general charge, the defense announced it had no objections or requests (R. 106). After the jury had been deliberating approximately five hours, the following occurred (R. 106–107):

> The COURT. Will counsel come to the bench?
> (At the bench:)
> The COURT. I want to show you gentlemen a note that I have received from the jury. I think as to the question they ask on No. 2 I shall have to say that I cannot give them any such assurance.
>
> * * * * *
>
> (In open court:)
> The COURT. Who is the foreman of the jury?
> The FOREMAN. (Juror No. 8) I am.

The COURT. Mr. Foreman, the Court has received your note, which reads as follows:

"Have we other choice of verdicts than these four?

"One, guilty with death penalty;

"Two, guilty as charged;

"Three, not guilty by reason of insanity;

"Four, not guilty."

Now, these four are the only possible verdicts. No other verdict is possible.

Then you go on and ask:

"On No. 2 above: Can we the jury be assured that the defendant legally be imprisoned for the remainder of his natural life? No possibility of release * * *"

I can give you no such assurance. I think I might explain to you that the maximum term the Court can impose is 30 years, but even if the Court imposes the maximum; and of course I can, even if the Court imposes the maximum, the Court also has to impose a minimum sentence. So that the longest term the Court can impose would be an indeterminate sentence of 10 to 30 years. The minimum has to be not more than a third of the maximum. Then at the end of the minimum sentence the Parole Board would have to decide whether the maximum should be served, or anything less than the maximum.

So that I can give you no assurance that the defendant would legally be imprisoned for the remainder of his natural life if he is found guilty as charged.

Now, your last question:

"May the jury have a reading of the D. C. Code re: rape?"

It reads this way:

"Whoever has carnal knowledge of a female forcibly and against her will, shall be imprisoned for not more than 30 years: *Provided,* That in any case of rape the jury may add to their verdict, if it be guilty, the words 'with the death penalty,' in which case the punishment shall be death by electrocution: *Provided further,* that if the jury fail to agree as to the punishment, the verdict shall be received and the punishment shall be imprisonment as provided in this section."

Have I clearly answered all your questions?

The FOREMAN. Yes, Your Honor.

The COURT. You may retire for further deliberation (R. 106–107).

Twenty minutes later, the verdict of guilty with the death penalty was returned (R. 108).

SUMMARY OF ARGUMENT

I

A. Petitioner's voluntary confession was, in the circumstances of this case, admissible under the *McNabb-Upshaw* rule promulgated by this Court. That rule makes a confession, even though voluntary, inadmissible if made during unnecessary detention prior to bringing the prisoner before a committing magistrate. A crucial element for its application is a finding of unnecessary detention.

What is unnecessary detention cannot be measured in terms of the time element alone but must of necessity depend upon the *reasonableness* of the detention in the light of the circumstances surrounding the cus-

tody and confession in each case. Thus, none of the cases—either those of this Court or the lower courts—have gone so far as to hold that *any* delay in arraignment, *ipso facto,* results in the exclusion of a confession forthcoming during its continuance. Rather, the cases have turned, not only on the length of detention, but upon the purpose behind the detention as well as the manner in which the delay was utilized. Lower court decisions since the *McNabb* and *Upshaw* cases have consistently held varying periods of delay for the purpose of legitimate and proper investigation to be reasonable detention.

A consideration of Rule 5 (a) of the Federal Rules of Criminal Procedure confirms that the reasonableness of the detention under the circumstances of each case is the proper test for determining what is illegal delay that will invalidate a confession. The language of that rule which provides for arraignment after arrest "without unnecessary delay" supersedes statutory provisions containing such language as "immediately" or "forthwith," and indicates that there are situations where some detention before arraignment is inevitable and justified.

The problem is one of balancing the interest of the public in proper law enforcement against the right of the individual suspect to be free from oppressive techniques. Although students of the subject have differed as to where the line should be drawn, there is almost universal agreement that some degree of questioning of persons under arrest is both necessary and desirable, not only for proper law en-

forcement but to guard the interests of innocent persons against victimization by false charges. The courts have looked to the circumstances of each case to determine whether there was reasonable delay consistent with fair police practice.

B. The delay in the instant case was not unreasonable. Petitioner was brought to police headquarters at 3 p. m. and questioned for, at the longest estimate, from 30 to 45 minutes. Thereafter, a delay of approximately 6-½ hours intervened before his confession at 9:30 p. m. The delay was mainly caused by the necessity under the circumstances of this case for talking separately with petitioner and his two nephews before lodging such a serious criminal charge. The congested condition of the police station undoubtedly contributed to this delay but the primary reason was the unavailability of the trained polygraph operator—a delay acquiesced in by petitioner who had agreed to take the lie detector test at 4 p. m., a few minutes after the completion of the initial questioning. By petitioner's own admission, he was not questioned at all after this time until 8:00 p. m., when he reported for the polygraph examination, which consumed 90 minutes. He spent the greater portion of the time of detention just sitting together with his two nephews, eating and drinking, and waiting for the polygraph examination.

The record negates any assertion of unfair police practice indicative of illegal detention. Petitioner was treated with courtesy and consideration. There

was no physical coercion, no prolonged or relay questioning, no holding the prisoner incommunicado.

There was likewise no "psychological pressure" such as denounced by the *McNabb-Upshaw* rule. The lie detector test was given with petitioner's permission; indeed, he expressed a desire to be examined. The examination is not one that would induce an innocent man to confess; if its use occasions any fear, it is a fear of the truth and its consequences. It is recognized by the highest courts of several states as a legal and proper investigative aid that does not render inadmissible a confession otherwise competent. Similarly, there is nothing in the record to show that a "sympathy approach" was used as a device. Nor is it a technique that would cause an innocent man to confess.

The police in this case, we submit, acted throughout with propriety and within the bounds of decent law enforcement.

II

The trial court—properly, we believe—admitted in evidence articles of clothing which were purportedly worn by petitioner at the time of the crime, and which were recovered, with his consent, by police officers. The permission to search was given by petitioner freely and voluntarily, orally and in writing, immediately following his confession. The written permission was signed by petitioner in the presence of witnesses who testified that no promises or threats of any kind were made to petitioner and that he was alert and comprehending at the time.

Petitioner erroneously relies on decisions which find implicit intimidation negating true consent in situations where a suspect is first apprehended by police. In the present case, the consent followed a full confession.

The confession here was voluntary; therefore, the consent was voluntary. The situation is like that in *United States* v. *Mitchell*, 322 U. S. 65, where there was spontaneous consent to search and concession of guilt. The majority and dissent below properly found that petitioner's consent to search, being an immediate accompaniment to his confession, derived color from the confession.

III

The judge also acted within the bounds of propriety when he told the jury, in response to their specific inquiry, that he could give it no assurance that petitioner would be imprisoned for life because of the applicable indeterminate sentence law and the function of the Parole Board. The jury was, under the statute, charged with the duty of deciding whether the death penalty should be imposed. It had the right to base its discretion on the whole law with respect to punishment as well as any other consideration which appealed to it. See *Winston* v. *United States*, 172 U. S. 303.

Since parole laws determine the actual time of incarceration, a jury cannot intelligently impose sentence without a knowledge of them. It is not persuasive to argue that such knowledge might cause the jury, in

an effort to circumvent parole laws, to fix a greater punishment than it might otherwise consider. A sentencing judge may do likewise. Moreover, it is doubtful that a defendant's best interest is served by leaving the jury to apply its own limited knowledge of parole. For this reason, it has even been suggested that the instruction as to parole in these cases should come from the court voluntarily as a part of the general charge, before remarks of counsel or common knowledge give it undue importance in the minds of the jurors.

Some speculation by a jury as to punishment is inevitable; it would appear to be seriously objectionable only where it might influence a jury in reaching a verdict in derogation of the doctrine of reasonable doubt. There was no such danger of confusing the verdict with punishment here. The charge objected to was not made voluntarily before the jury retired to reach a verdict; it could not have beclouded the issue. It came in answer to specific questions which had to be dealt with and which gave every indication that the jury had already disposed of the question of innocence or guilt and was concerned only with the punishment of petitioner. It was responsive, accurate, and objective in character. It was the only logical recourse left to the court.

ARGUMENT

I

PETITIONER'S CONFESSION WAS PROPERLY ADMITTED IN EVIDENCE SINCE THE PERIOD OF DELAY IN ARRAIGNMENT WAS NECESSARY UNDER THE CIRCUMSTANCES IN THIS CASE.

A. THE M'NABB RULE PERMITS REASONABLE DETENTION PENDING INVESTIGATION

This Court in *Upshaw* v. *United States,* 335 U. S. 410, reaffirmed the rule of *McNabb* v. *United States,* 318 U. S. 332, that a confession, although voluntary, is inadmissible if made during unnecessary detention prior to bringing the prisoner before a committing magistrate. It is important at the outset to observe that the rule does not exclude a confession upon the sole ground that it was forthcoming during *any* delay in arrangement. *McNabb, supra,* 318 U. S. at 346; *United States* v. *Mitchell,* 322 U. S. 65.[3] A crucial element for its application is a finding that it was made during *unnecessary* detention. See *United States* v. *Carignan,* 342 U. S. 36.

What is unnecessary detention cannot be measured solely in terms of time of custody before arraignment but must of necessity depend also upon the reasonableness of the detention in the light of the totality of

[3] In *United States* v. *Mitchell, supra,* this Court held that eight days of illegal detention did not destroy the validity of a confession made between arrest and arraignment when the confession was made a few minutes after the suspect's arrival at the police station. The confession, made before the illegal detention had occurred, was found not to have been caused by the detention.

the circumstances surrounding the custody and the confession. Thus, the cases have turned not only on the length of detention, but upon the purpose behind the detention and the manner in which the delay was utilized.

The *McNabb* and *Upshaw* cases stand for the proposition that a prolonged period of detention for the very purpose of extracting a confession constitutes an unreasonable delay, particularly where the period of detention is utilized for extended interrogation. The *McNabb* case was decided on the assumption that the five defendants were detained for periods ranging in time from several hours to several days while being continually questioned for many hours under psychological pressures for the purpose of extracting inculpatory statements. See *McNabb* v. *United States*, 318 U. S. at 341–347; *United States* v. *Mitchell*, 322 U. S. at 67. Likewise, in the *Upshaw* decision, *supra*, the fact that the accused was held for thirty hours "for the very purpose of securing * * * challenged confessions" was deemed indicative of unnecessary delay and thus illegal detention. 335 U. S. at 414.

These decisions do not, however, go so far as to hold that questioning during any period of delay *ipso-facto* results in the outlawing of a confession. In other words, the decisions do not hold, as the dissenting opinion below in this case would hold, that immediately after arrest, without any delay for the purpose of investigation, an accused must be brought before a committing magistrate if one is available. The deci-

sions since *McNabb* and *Upshaw* have quite consistently held that varying periods of delay, sometimes for longer than the thirty-hour period involved in *Upshaw,* were not unreasonable where, under all the circumstances, the delay was utilized, not for the sole purpose of extracting a confession, but for legitimate and proper investigation. *Pierce* v. *United States,* 197 F. 2d 189 (C. A. D. C.), certiorari denied, 344 U. S. 846; *Leviton* v. *United States,* 193 F. 2d 848 (C. A. 2), certiorari denied, 343 U. S. 946; *Haines* v. *United States,* 188 F. 2d 546 (C. A. 9), certiorari denied, 342 U. S. 888; *Patterson* v. *United States,* 183 F. 2d 687, 691 (C. A. 5), 192 F. 2d 631, certiorari denied, 343 U. S. 951.

Thus, the Court of Appeals for the Ninth Circuit, in *Haines* v. *United States, supra,* 188 F. 2d 546, certiorari denied, 342 U. S. 888, held that a period of delay from approximately 10:00 a. m. until the following morning was reasonably necessary in the interest of justice to a suspected counterfeiter being detained to give secret service officers an opportunity to check on information given them by the suspect. During the detention, the suspect made an oral admission, turned over memoranda to the officers, and accompanied them to his "crime laboratory" as well as to the office of the Assistant United States Attorney where he admitted guilt and identified counterfeit notes as his. Later, he signed a written statement. The court pointed out that a rule which would make the timing of a confession the sole consideration, apart from other pertinent factors, would cause confusion

and uncertainty in a variety of circumstances (188 F. 2d at 551).

In the Fifth Circuit, the Court of Appeals in *Patterson* v. *United States, supra,* 183 F. 2d 687, 192 F. 2d 631, certiorari denied, 343 U. S. 951, held that a delay in arraignment of some two and three-quarter hours was not such unnecessary delay as to make inadmissible a confession made during this time. In that case, a suspected forger was taken into custody at 11:15 a. m. He admitted guilt some time between thirty minutes to two hours after his arrival at police headquarters and was arraigned at 2:00 p. m.

In *Leviton* v. *United States, supra,* 193 F. 2d 848 (C. A. 2), certiorari denied, 343 U. S. 946, the defendant was picked up by customs agents investigating export violations at 1:45 p. m. He agreed to accompany them to their office where they arrived at 2:30 p. m. At 3:30 p. m., he was questioned initially for three minutes at which time he told agents where they could find certain files giving important information as to the alleged violations. The agent who went to recover the files did not return until 6:30 p. m. Between 9:20 p. m. and 11:50 p. m., with a fifteen-minute recess, the defendant was questioned formally. He related details of the crime, was detained overnight, and was arraigned at 7:00 p. m. the following day. The Court of Appeals for the Second Circuit held the delay was reasonable in that it was occasioned by the defendant's own readiness to confess and voluntary assistance to the investigating authorities (193 F. 2d at 855).

The same view, despite an earlier intimation to the contrary,[4] is the view that prevails in the Court of Appeals for the District of Columbia Circuit, the circuit in which most of the *McNabb* problems have arisen in recent years.[5] In *Garner* v. *United States*, 174 F. 2d 499 (C. A. D. C.), certiorari denied, 337 U. S. 945, it was held that confessions of murder obtained during the night after one defendant had been detained for a period of from forty-five minutes to an hour and a half, and another for three and one-half hours, were admissible, the detention not being "unnecessary delay." In *Pierce* v. *United States*, 197

[4] In a 1946 decision, *Akowskey* v. *United States*, 158 F. 2d 649 (relied upon by petitioner), the Court of Appeals for the District of Columbia Circuit found that the action of the police, in bypassing committing magistrates to take an accused from the place of arrest to police headquarters where he was questioned continuously for seven hours, was a violation of the *McNabb* rule making his confession inadmissible. The court recognized, however, that "in many instances the circumstances may dictate that some delay ensues between arrest and commitment amounting to one, two or many hours * * *" (158 F. 2d at 650).

[5] There is a division in the District of Columbia Circuit as to whether, even if a confession is made in response to questioning during an illegal period of delay, the confession can be said to be caused by the delay. Compare *Garner* v. *United States*, 174 F. 2d 499, 501–502 (C. A. D. C.), certiorari denied, 337 U. S. 945, with *Allen* v. *United States*, 202 F. 2d 329, 334 (C. A. D. C.), certiorari denied, 344 U. S. 869, and *Pierce* v. *United States*, 197 F. 2d 189, 193, certiorari denied, 344 U. S. 846. See also the opinions in *Rettig* v. *United States*, 239 F. 2d 916 (C. A. D. C.).

That problem is not reached in this case. We do not deny that, on the facts of this case, there may be sufficient evidence of a causal relationship between the detention and the confession. Our position is that there was no unnecessary delay within the meaning of the *McNabb-Upshaw* rule (see *infra*, pp. 129).

F. 2d 189 (C. A. D. C.), certiorari denied, 344 U. S. 846, a robbery suspect confessed at 11:00 a. m.[4] after having been taken into custody at 11:30 p. m. the night before. The Court of Appeals, relying on the reasoning of the Ninth Circuit in *Haines, supra,* concluded that this was not unreasonable detention (197 F. 2d at 194). See also the concurring opinions of Judge Bazelon in *Pierce, supra,* 197 F. 2d at 194, and in *Allen* v. *United States,* 202 F. 2d 329, 335 (where the detention was from noon to 7:30 p. m.).

A similar case recently decided in the District of Columbia Circuit is *Watson* v. *United States,* 234 F. 2d 42.[5] Watson, suspected of murder, was arrested at 6:40 p. m. one evening. He was taken to police headquarters at 7:00 p. m. and commencing at 8:00 was questioned for forty-five minutes. He was questioned again at 11:00 p. m. and produced at a police line-up. There followed intermittent questioning at 12:30 a. m. and a lie detector test at 3:00 a. m. He admitted guilt shortly after 3:15 a. m., completed a full oral confession at 4:00 a. m., and, after sleeping until 7:30 a. m., repeated the oral confession at 8:00 a. m. The court, in finding no unnecessary delay to this point,[6] said (p. 45–46): "Reasonable inquiry was

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[4] Pierce was not arraigned until 4 p. m. on the day of the confession (197 F. 2d at 191).

[5] See also *Billotson* v. *United States,* 231 F. 2d 736, certiorari denied, 351 U. S. 989; *Rettig* v. *United States,* 239 F. 2d 916.

[6] But Watson was not arraigned until two or three o'clock the afternoon of that day. During the intervening time (between 8 a. m. when he repeated his oral confession and time of arraignment) he again narrated details of the crime, was taken to the

appropriate, despite information coming to the notice of the police as a result of which suspicion was fastened upon Watson. 'The police could hardly be expected to make a murder charge on such uncertainties without further inquiry and investigation' [citing 342 U. S. at p. 44]. Before complaint of serious crime is levied, appropriate inquiry is certainly to be permitted, both in the interests of society and of the accused himself, for gross wrong can follow from a charge improperly and improvidently filed against an innocent man."

The reasonableness of the detention as a test of the validity of a confession in the circumstances of each case accords with the language of the Federal Rules of Criminal Procedure. Rule 5 (a), which was in process of formulation when the *McNabb* decision was handed down and which is cited and relied upon in the *Upshaw* decision, provides for arraignment after arrest "without unnecessary delay" (p. 2 *supra*). The wording of the rule, which supersedes the various statutory provisions containing

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scene of the crime for re-enactment and to his apartment to pick up certain clothing in which the police were interested, and was brought back to headquarters to make a written statement. The court found that this further detention was unnecessary delay, pointing out there was no reason at this point to check facts further, it being clear that there was reasonable cause for lodging a complaint. The written confession forthcoming during this time was therefore found to be inadmissible, and the conviction was reversed for this reason. The Government did not seek certiorari from that decision. The Government also did not seek certiorari from the *Rettig* decision, *supra*, note 7.

such language as "immediately" or "forthwith,"[9] quite plainly contemplates consideration of factors other than the length of time required to take a suspect to the nearest committing magistrate.[10] A flexible standard is set up rather than an unyielding rule of exclusion or a rigid specification of maximum time.[11]

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[9] 28 Stat. 416 (1894) prescribed that it shall be the duty "of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the *nearest* circuit court commissioner * * * and *no mileage shall be allowed any officer violating the provisions hereof.*" [Emphasis added.] See also 27 Stat. 609 (1893), imposing this duty in substantially the same language.

20 Stat. 341 (1879) provided that where "any marshal or deputy marshall * * * shall find any person * * * in the act of operating an illicit distillery, it shall be lawful * * * to arrest * * * and take him * * * *forthwith* before some judicial officer * * * *who may reside in the county of arrest* or if none, *in that nearest to the place of arrest.*". [Emphasis added.]

48 Stat. 1008 (1934) authorized officers of the FBI to make arrests and prescribed that "the person arrested shall be *immediately* taken before a committing officer." [Emphasis added.]

These three statutes, cited by this Court in the *McNabb* case, *supra*, are no longer in effect. For a discussion of their legislative history, see Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 Ill. L. Rev. 442, 455–459.

[10] See *The Caviguan Case: A Study of the McNabb Rule*, 42 J. Crim. Law 351, 354; 25 So. Calif. L. Rev. 215; 100 Univ. of Pa. L. Rev. 136, 139.

[11] Some state statutes permit delays in arraignment up to 24 and 48 hours. Missouri Rev. Stats. (1939) § 4346; Calif. Penal Code (1941) § 825.

The formulators of the Uniform Arrest Act suggested that the problem be met by providing for detention, not amounting to arrest, for a period not exceeding two hours, for arraignment within 24 hours after arrest, and for the holding of a suspect for an additional period of 48 hours if a judge so ordered for

As the cases and the literature on the subject indicate, the problem is essentially one of drawing a balance between the public interest in effective law enforcement and the public interest in protecting individuals suspected of crime to be free from oppressive law enforcement techniques. As the Court of Appeals for the Ninth Circuit pointed out in the *Haines* case, *supra*, 188 F. 2d 546, some detention before arraignment is inevitable and almost always desirable for the interests of the prisoner as well as the Government. Often, information believed reliable will be proved erroneous by the questioning of the suspect and the checking of the information supplied by him. He may be spared irreparable damage which would result from the publicity that would follow a charge, supported by what appears to be probable cause, but later found to be ill-advised. A rule of law prohibiting any inquiry without arraignment would seriously hamper law enforcement and would often work to the disadvantage of persons accused of crime.

The problem of just what degree of investigation can be said to be legitimate law enforcement and what goes over into oppressive measures is obviously

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good cause shown. Warner, *The Uniform Arrest Act*, 28 Va. L. Rev. 315, 339–342, 344, 347.

See also Waite, *Police Regulation by Rules of Evidence*, 42 Mich. L. Rev. 679; McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 Texas L. Rev. 239, 274–275.

In England, the arraignment statutes contain no express requirement for immediate presentment where there is an arrest pursuant to a warrant, but persons taken into custody without warrants must be arraigned within 24 hours after arrest. Summary Jurisdiction Act, 1879, 42–43 Vict., c. 49, § 38.

not a simple one. It is a matter on which students of the subject have written and differed for years, before and since the *McNabb* rule.[12] It is significant, however, that there is almost universal agreement that some degree of questioning of persons under arrest is both necessary and desirable. Congress gave some thought to the legislation on the subject immediately after the *McNabb* decision (see Hearings before Subcommittee No. 2 of the Committee on the Judiciary, House of Representatives, 78th Cong., 1st Sess.), but the matter has been left to the courts to determine how far they will use their power to exclude evidence to regulate the questioning of arrested persons by law enforcement officers.

We think that the flexible doctrine that has emerged—a doctrine emphasizing the reasonableness of detention in each particular case—is a sound one. As the cases illustrate, there can be no rigid definition of what constitutes necessary or unnecessary delay.

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[12] See, e. g., National Commission on Law Observance and Enforcement, *Report on Lawlessness in Law Enforcement* (1931); Warner, *The Uniform Arrest Act*, 28 Va. L. Rev. 315, 317–324; Hall, *Law of Arrest in Relation to Contemporary Social Problems*, 3 U. of Chi. L. Rev. 345, 356–357; Fraenkel, *From Suspicion to Accusation*, 51 Yale L. J. 748, 753–758; Waite, *Police Regulation by Rules of Evidence*, 42 Mich. L. Rev. 679, 689–693; Dession, *The New Federal Rules of Criminal Procedure: I*, 55 Yale L. J. 694, 706–714; Berge, *The Proposed Federal Rules of Criminal Procedure*, 42 Mich. L. Rev. 353, 357–359; *Illegal Detention and the Admissibility of Confessions*, 53 Yale L. J. 758; McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 Tex. L. Rev. 239, 270–278; *id.*, *Admissibility of Illegally-Obtained Confessions in Federal Courts*, [1945] Wis. L. Rev. 105; *id.*, *The McNabb Rule Transformed*, 47 Col. L. Rev. 1214; Dorskind, *The Effect of Hobbs Bill on Self-Incrimination and Confessions*, 32 Cornell L. Q. 594.

The period of permissible detention consistent with fair police practice must of necessity depend upon such circumstances as the purpose behind the detention, the number of persons involved in the crime, the reliability of the information upon which an accusation is based, the availability of a committing magistrate, etc. The issue in each case must necessarily be whether under all the circumstances the delay was attributable to reasonable police behavior which did not unduly infringe the rights of the suspect.

B. THE DELAY IN THE INSTANT CASE WAS NOT UNREASONABLE

In the circumstances of the present case, the delay in arraignment was reasonable and necessary. Petitioner was arrested at 2:30 p. m. the day after the crime, and after he was known to have left his home. Petitioner was one of three suspects, the others being his two grown nephews, who lived at the same address. All three fitted the same general description as that given of the perpetrator of the crime (R. 19). All three men, because of residence on the premises and the time element involved, had easy access to the site of the crime (R. 17, 77, 81). Two of them had disappeared after the commission of the crime (R. 111). To have placed such a serious criminal charge against any one of them without a reasonable opportunity for inquiry would have been unwarranted. Not to have sought information from all three under these circumstances would have been a breach of the duty owed by the police to the public to detect and apprehend the person guilty of a serious crime of violence.

Petitioner arrived at police headquarters at 3:00 p. m. and was questioned for 15 to 30 minutes (according to the police, R. 25, 58) or 30 to 45 minutes (by petitioner's testimony, R. 87). Thereafter, the detention of approximately seven hours that ensued before attempted arraignment at 10 p. m.[13] (R. 52, 64) was caused, in most part, by administrative difficulties complicated by the necessity for talking with the three men separately. Undoubtedly, the congested condition of the police station contributed to the delay; there was testimony that the initial questioning took place in the Identification Bureau because the Sex Squad office was busy at the time (R. 22). However, the prime reason for delay was the unavailability of the trained polygraph operator—a delay that had at least the tacit approval of petitioner, for he had agreed to take the polygraph examination at 4:00 p. m., a few minutes after the completion of the initial brief questioning (R. 53). The examiner,[14] who was not available until 6:00 p. m., and who did not see petitioner until 8:00 p. m. (having questioned his two nephews first), questioned petitioner for only an hour and one-half (R. 59, 60). The remainder of the time petitioner spent together with one or both of his two nephews, just sitting, eating, and drinking while

[13] Petitioner's confession was made at 9:30 p. m. and reduced to writing between 11:30 p. m. and 12:30 a. m. (R. 56, 61, 70). He was arraigned on that morning (R. 64).

[14] In this regard, it should be stressed that proper administration of a lie detector test requires the services of a specialist with training and skill in conducting the examination and making a a diagnosis. See Inbau, *Lie Detection and Criminal Interrogation* (3d ed.), pp. 114, 116.

waiting for the polygraph examination (R. 88–90). By petitioner's own testimony, he was not questioned during that time (R. 89). Here then, there was no detention of a single suspect for the primary purpose of eliciting a confession from him, or any other indication of calculated non-compliance with the requirement of arraignment without unnecessary delay. Instead, there was detention for the legitimate purpose of checking on the information given by one of three persons reasonably suspected of having committed a serious crime.

The record negates petitioner's assertion of unfair police conduct indicative of an illegal detention. Petitioner was treated with courtesy and consideration. It is conceded that there was no physical coercion (R. 97). He was given food and drink (R. 90). There was no prolonged or relay questioning. By the testimony most favorable to petitioner, he was questioned for only thirty to forty-five minutes initially (R. 87), and later for an hour and one-half pursuant to the polygraph examination which he voluntarily took, or a total time of no more than two and a quarter hours in two separate sessions.

Petitioner was not held incommunicado. When he was first brought to the police station, he was taken to a room with his brother and his nephews (R. 87). As already pointed out, at least part of the initial questioning of petitioner took place in the presence of his brother and his nephews (R. 29, 87). He agreed to take the lie detector test in the presence of his nephews (R. 65, 66, 88). From about 3:45 p. m. until 8:00 p. m., petitioner sat in the Sex Squad office

with one or both of his nephews (R. 47–49, 64, 65, 67, 88, 89). He was not held in a cell or secreted in a back room. His relatives had knowledge of the situation, and either he or they could have sought counsel if desired. There is no indication in the record that the police sought to keep his detention a secret or to prevent him from communicating with persons outside the police station.

Moreover, however, as pointed out above (*supra*, p. 5), he took the polygraph examination voluntarily; no one compelled his submission to it. See *Tyler* v. *United States*, 193 F. 2d 24, 29 (C. A. D. C.), certiorari denied, 343 U. S. 908. Indeed, there was testimony that he indicated a desire to take the test, even signing a statement to that effect, in order to prove his innocence (R. 61). In any event, there is nothing so formidable about the appearance of a polygraph machine that would induce an innocent person to confess to a crime. The conventional apparatus consists of a blood pressure cuff of the same type used by physicians, a pneumograph tube which when fastened on the chest measures changes in respiration, and a small electrode unit attached to the hand which records skin reflex. See Inbau, *Lie Detection and Criminal Interrogation* (3d ed) pp. 5–8; see also R. 74. It is a matter of common knowledge that the purpose of the machine is to detect deception. The success of its use depends upon pre-test instruction as to procedure; the person being examined knows at the outset that the experience involves merely the answering of questions. See Inbau,

supra, p. 11. If its use occasions any fear, it is not a fear of the machine but a fear of the truth and its consequences. This is not the "psychological pressure" denounced by the *McNabb-Upshaw* doctrine. Neither is it such pressure that would make a confession "untrustworthy," the standard used by this Court prior to the formulation of the *McNabb* rule.[15] The use of the lie detector has been recognized as a legal and proper investigative aid. The highest courts of several states have held that the technique does not render inadmissible a confession otherwise competent.[16]

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[15] See *Wilson* v. *United States*, 162 U. S. 613; *Brown* v. *Mississippi*, 297 U. S. 278.

[16] *Commonwealth* v. *Hipple*, 333 Pa. 33, 3 A. 2d 353; *State* v. *Collett*, 144 Ohio St. 639; 58 N. E. 2d 417; *State* v. *DeHart*, 242 Wis. 562, 8 N. W. 2d 360; *People* v. *Hills*, 30 Cal. 2d 694, 185 P. 2d 11. See also *Commonwealth* v. *Jones*, 341 Pa. 541, 19 A. 2d 389; *State* v. *Lowry*, 163 Kan. 622, 628, 185 P. 2d 147, 151; *Henderson* v. *State*, 230 P. 2d 495 (Okla. Cr. App., (1951); *Pinter* v. *Satte*, 203 Miss. 344, 34 So. 2d 723.

In the *Hipple* case, *supra*, the defendant had confessed to a murder after having been given a lie detector test. He objected to the admissibility of the confession because the instrument had been used and because he had been told by the investigating officers that "[y]ou can lie to us but you cannot lie to this machine." [p. 39] In upholding the trial court's ruling in admitting the confession, the Pennsylvania Supreme Court held that, since no promises, force, or threats had been employed in obtaining it, the mere use of the instrument did not render the confession inadmissible. The court also stated that, even if the officers' comments regarding the defendant's inability to "lie to th[e] machine" could be considered a trick, that fact alone would not nullify the confession, because of the general rule pertaining to confessions procured "by a trick or artifice, not calculated to produce an untruth * * *." [p. 39]

Nor is there anything in the record to show that "sympathy" was used as a device to induce a confession. At trial, when the polygraph operator was asked if his sympathy for petitioner was a device, he replied, "I was sorry for him now, then, and I am now. And it was sincere" (R. 76). But even if the approach had been a device, it would not have nullified a confession obtained through its use. It is not a technique which would be apt to induce an innocent man to confess to a crime he did not commit. See Wigmore, *Evidence,* (3d ed.) § 841; Inbau, *supra,* pp. 195–197. See also *Jackson* v. *United States* 102 Fed. 473, 483 (C. A. 9); *Lewis* v. *United States,* 74 F. 2d 173, 177 (C. A. 9) This Court has recognized that greater deception, such as the use of a decoy, is a proper means of law enforcement. *Sorrells* v. *United States,* 287 U. S. 435, 441–442. Inducing a person by kindly means to tell the truth is hardly inconsistent with fair procedure.

Petitioner stresses the fact that the psychological examinations during the insanity proceedings show him to be a person of low mentality. But the police can hardly cease to investigate a crime because the suspect is of low mentality (assuming, what is not shown here, that the police could have known at the time that petitioner's mentality would be found to be low).[17] So long as the police behaved with propriety, in accordance with civilized standards, they cannot be said to have been derelict in their obligations because a more acute mentality might have made their task of detection more difficult.

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[17] The police testified that petitioner appeared to be alert and comprehending (R. 69).

Here, we submit, the police acted well within the limits of decent law enforcement. There was no unreasonable delay for the sole purpose of extracting a confession. There was delay for the legitimate purpose of checking on the stories of three persons, all of whom were reasonably suspected of having committed a serious crime. There was no harsh treatment, no holding petitioner incommunicado, no undue pressure of any kind. There was in fact courteous and considerate treatment. Such conduct does not overstep the bounds of proper law enforcement and does not require the exclusion of a confession which was manifestly voluntary.

II.

EVIDENCE OBTAINED THROUGH A SEARCH MADE WITH PETITIONER'S CONSENT AFTER HIS CONFESSION WAS PROPERLY ADMITTED

Petitioner contends that the trial court committed error in admitting into evidence articles of clothing worn by him at the time of the crime and recovered, with his consent, by police officers. After he had confessed, petitioner gave permission for the search, orally and in writing (R. 35). The written statement was signed by petitioner (R. 35–36) and witnessed by officers who testified at the trial that no promises or threats of any kind were made to petitioner, that his consent was given freely and voluntarily, and that he was alert and comprehending at the time (R. 35, 44). The court below therefore found the consent to have been given without duress or coercion (R. 115). It was "unequivocal and specific" and freely and in-

telligently given. See *Karwicki* v. *United States,* 55 F. 2d 225, 226 (C. A. 4); *Kovach* v. *United States,* 53 F. 2d 639 (C. A. 6).

Petitioner relies on two District of Columbia decisions, *Judd* v. *United States,* 190 F. 2d 649, and *Higgins* v. *United States,* 209 F. 2d 819, holding that consent to search, given at a time when the suspect was first apprehended by police officers, could not be deemed a true consent since intimidation and duress were implicit in the circumstances. But there is a vast difference between consent given while under arrest at a time when the defendant is denying (or at least not admitting) guilt and consent given after the accused has made a full confession of his crime. In the latter situation, which is the situation here, the consent to search is really an extension of the confession, and is motivated by the same psychological factors, inducing disclosure and expiation, that motivate the confession. If the confession was voluntary, as seems clear irrespective of its admissibility under the *McNabb* rule, the consent to the search was equally voluntary.

Both the majority and dissent of the court below, relying on *United States* v. *Mitchell,* 322 U. S. 65, agreed that, as petitioner's consent was an immediate accompaniment to his confession, it "derives color from the confession" (R. 115, 118). The situation here is similar to that in *Mitchell, supra,* where the Court said at 322 U. S. 65, 70: "Here there was no disclosure induced by illegal detention, no evidence was obtained in violation of any legal rights, but instead the consent to a search of his home, the prompt

acknowledgment by an accused of his guilt, and the subsequent rueing apparently of such spontaneous cooperation and concession of guilt." Although here petitioner's cooperation may have been somewhat less spontaneous than in *Mitchell,* the reasoning of that case applies. The consent and confession are so interrelated that the test of voluntariness must be the same. It was the confession, and not the arrest, which induced the consent. The voluntariness of the confession thus establishes the voluntariness of the consent.

III

THE JURY, CHARGED WITH DISCRETION UNDER THE STATUTE IN DETERMINING PUNISHMENT, WAS PROPERLY INFORMED OF THE LAW ON THE SUBJECT

Petitioner argues that the trial judge committed reversible error by his answer to a specific inquiry from the deliberating jury as to whether he could assure them that petitioner would be imprisoned for life. After stating that he could give no such assurance, the trial judge explained that any sentence imposed by him must conform to certain maximum and minimum standards, and, at the end of the service of the minimum term, would be subject to the review of the Parole Board. We believe that the judge, faced with the inquiry, was obliged to do exactly what he did—give the jury a correct, sober, objective reply to its question.

The District of Columbia statute under which petitioner was convicted permits a jury to add to its verdict a provision for the death penalty, "in which case the punishment shall be death by electrocution

* * *." 22 D. C. Code § 2801 (1951) (*supra*, pp. 2, 3, [redacted]). Thus, the statute gives the jury the power to sentence, although the penalty is loosely referred to as a part of the verdict. The desirability of this type of legislation has been a subject of wide discussion,[18] but the fact is that a vast number of statutes do vest the jury with discretion in imposing punishment. These statutes include provisions ranging in degree from the grant of authority to recommend mercy in an advisory or mandatory capacity to the grant of authority to fix the quantum of punishment, varying from a term of years within specified limits to the mandatory death penalty. See, for example, Ala. Code Ann. (1940) Title 15, § 335; Ill. Rev. Stat. (1947) c. 38, § 754a; Cal. Pen. Code (1941) § 190; Fla. Stat. 1941 § 919.23 (1), (2). Compare 18 U. S. C. 1111, 1201.

In cases arising under these statutes, it is of course inevitable that the jury will engage in a certain amount of speculation as to punishment, including

[18] See Comment, 17 U. of Chi. L. Rev., 400, 408, where it is argued that, as between court and jury, punishment should be kept within the exclusive power of the court because: (1) the court is less likely to limit the parole board's discretion as to when a particular prisoner should be released; (2) determination of punishment by juries is contrary to the rule of reasonable doubt; (3) the imposition of punishment requires some knowledge of the defendant's background and character.

See also Williams, *Jury Discretion in Murder Trials*, 17 Mod. L. Rev. 315, (which discusses a proposal made by Great Britain's Royal Commission on Capital Punishment to entrust to the jury after a conviction in capital cases discretion to decide whether there are any extenuating circumstances which make it undesirable that the capital penalty should be imposed).

speculation as to possible alternative punishments. Nor is such speculation—at least under federal law—necessarily beyond the jury's province. Where Congress has seen fit to entrust the jury with the responsibility of punishment, the jury has the right to base its discretion on the law on that subject as well as any other consideration which appeals to it. This is the reasoning of this Court in *Winston* v. *United States*, 172 U. S. 303, where, in a decision holding that the authority of a jury to decide against capital punishment in a federal prosecution for murder was not limited to cases of palliating or mitigating circumstances, it was said (p. 313):

> * * * The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court, or the jury, is of opinion that there are palliating or mitigating circumstances. But it extends to every case in which, upon a view of the whole evidence, the jury is of opinion that it would not be just or wise to impose capital punishment. How far considerations of age, sex, ignorance, illness or intoxication, of human passion or weakness, of sympathy or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, is committed by the act of Congress to the sound discretion of the jury, and of the jury alone.

See also *Tatum* v. *United States*, 190 F. 2d 612 (C. A. D. C.). Flatly inconsistent with this rationale is petitioner's contention (Pet. Br. 21) that the jury, in inquiring about the possibility of alternative punishments, "were concerning themselves with matters that were totally irrelevant to their function." As the *Winston* decision shows, it is the very essence of the jury's function in such cases to weigh all factors in determining whether the death penalty should be imposed.

And if the jury's consideration of alternative punishments does not constitute reversible error, surely neither does the jury's *knowledge* as to alternative punishments. It can hardly be contended that the jury's consideration of the matter must be uninformed. More specifically, since parole laws determine the actual amount of time a defendant will remain incarcerated, a jury charged with the imposition of sentence is entitled to correct information concerning such laws. This is the view of the majority of state decisions which have reasoned that punishment cannot otherwise be intelligently imposed.[19] This view has additional support from the fact that most state courts have held it is not prejudicial error for the prosecuting attorney to mention

[19] *State* v. *Burth*, 114 N. J. L. 112, 176 Atl. 183; *Liska* v. *State*, 115 Ohio St. 283, 152 N. E. 667; *Massa* v. *State*, 37 Ohio App. 532, 175 N. E. 219; *State* v. *Mosley*, 102 N. J. L. 94, 131 Atl. 292; *State* v. *Schilling*, 95 N. J. L. 145, 112 Atl. 400; *State* v. *Martin*, 94 N. J. L. 139, 109 Atl. 350; *State* v. *Carrigan*, 93 N. J. L. 268, 108 Atl. 315; *State* v. *Rombolo*, 89 N. J. L. 565, 99 Atl. 434. See also 90 U. of Pa. L. Rev. 221, noting *Sukle* v. *People*, 107 Colo. 269, 111 P. 2d 233; 51 Harv. L. Rev. 353, noting *State* v. *Carroll*, 52 Wyo. 29, 69 P. 2d 542.

the possibility of parole in his argument before the jury.[20].

In opposition to this majority view, it has been urged that it is improper for a court to "encourage" jury speculation on what an administrative officer "apart from the law under which the judiciary proceeds" might do in the future, since the jury is likely to fix a greater penalty than they otherwise might have considered.[21] The argument that a jury, armed with knowledge of parole after service of a minimum sentence, might, in an attempt to circumvent the parole or indeterminate sentence statutes at a future date, fix a greater penalty than it might otherwise normally impose, is not persuasive. A sentencing court likewise has that power.[22] Moreover, a defendant's interest is surely not served best by leaving the jury to apply its own limited knowledge of

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[20] *Underwood* v. *Commonwealth*, 266 Ky. 613, 99 S. W. 2d 467; *Sullivan* v. *State*, 47 Ariz. 224, 55 P. 2d 312; *Glenday* v. *Commonwealth*, 255 Ky. 313, 74 S. W. 2d 332; *State* v. *Stratton*, 170 Wash. 666, 17 P. 2d 621; *People* v. *Murphy*, 276 Ill. 304, 114 N. E. 609; *Hillen* v. *People*, 59 Colo. 280, 149 Pac. 250; *Jacobs* v. *State*, 103 Miss. 622, 60 So. 723; *Wechter* v. *People*, 53 Colo. 89, 124 Pac. 183; *State* v. *Junkins*, 147 Iowa 588, 126 N. W. 689. *Contra: State* v. *Johnson*, 151 La. 625, 92 So. 139.

[21] *Sukle* v. *People*, 107 Colo. 269, 111 P. 2d 233; *Houston* v. *Commonwealth*, 270 Ky. 125, 109 S. W. 2d 45; *Bean* v. *State*, 58 Okla. Cr. 432, 54 P. 2d 675; *Postell* v. *Commonwealth*, 174 Ky. 272, 192 S. W. 39, *Gaines* v. *Commonwealth*, 242 Ky. 237, 46 S. W. 2d 75; *State* v. *Dooley*, 89 Iowa 584, 57 N. W. 414; *Coward* v. *Commonwealth*, 164 Va. 639, 178 S. E. 797.

[22] In a number of cases, moreover, the death penalty has been imposed by a jury where the court has refused the jury's request for instruction concerning parole. *Krull* v. *United States*, pending on petition for a writ of certiorari, Nos. 556 and 557 Misc., this Term; *Gaines* v. *Commonwealth*, *supra*; *State* v. *Dooley*, *supra*.

parole. It is for this reason that it has been suggested that instruction as to parole is not only proper, but it is also advisable, and that it should come from the trial judge at the time of his charge, before speculation based either upon remarks of counsel or common knowledge of parole methods gives it undue importance in the jury's mind.[23] This view is in accord with this Court's *Winston* decision (*supra*), emphasizing the broad discretion of federal juries in determining whether a death penalty should be imposed.

As petitioner points out (Pet. Br. 22), the question of the propriety of instructing a jury as to the law of parole has been decided in only one federal case, *Lovely* v. *United States*, 169 F. 2d 386, 391 (C. A. 4). There, the trial judge in his general charge stated that a person sentenced to life imprisonment was eligible to parole after fifteen years. The Court of Appeals for the Fourth Circuit found this to be prejudicial error, reasoning that the jury had nothing to do with the defendant's punishment except to decide whether he should be given capital punishment, and that the charge as given beclouded the issue and opened way to a compromise verdict. The court relied upon two cases, neither of which, we think, is in point. *Ryan* v. *United States*, 99 F. 2d 864 (C. A. 8), certiorari denied, 306 U. S. 635, and *Coward* v. *Commonwealth*, 164 Va. 639, 178 S. E. 797. In the *Ryan* case, involving a prosecution for conspiracy to injure persons in the exercise of civil rights, the jury

[23] See *State* v. *Carrigan*, 93 N. J. L. 268, 108 Atl. 315; 90 U. of Pa. L. Rev. 221, 222; 51 Harv. L. Rev. 353, 354.

had nothing at all to do with punishment but only the duty to decide guilt; the court merely stated that it disapproved of the practice of permitting a detailed discussion of the extent of punishment in the argument and of indulging in a discussion in the instructions of the punishment that may be anticipated in the event of conviction. *Coward* v. *Commonwealth* represents the minority—and, we think, less persuasive—view among the State courts (see *supra*, p. 37); oddly enough, this decision, while holding that it is error for the court by its instructions (or for counsel in argument) to tell the jury that its sentence might be cut down by some other arm of the law, states that the error is harmless in murder cases where the sentence is death (718 S. E. at 799).[24]

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[24] A somewhat similar question was recently presented in the Court of Appeals for the Fifth Circuit. *Krull* v. *United States*, No. 15997, January 4, 1957, pending in this Court on petition for a writ of certiorari, Nos. 556 and 557 Misc., this Term. In that case, the trial court refused to answer the jury's inquiry as to parole and warned it against consideration of the matter. The jury directed the imposition of the death penalty. On appeal, the defendant complained of the remarks made by the trial court in attempting to divert the jury's attention from the question of parole. The Court of Appeals held that under the rape statute involved in the case (18 U. S. C. § 2031) the jury did not have the power to impose the death penalty, and thus rendered unnecessary any decision on "the question as to whether the court's comment and further instruction were prejudicial error." (Slip opinion, p. 29.) Nevertheless, the *Krull* case is significant for its demonstration of the futility of dealing with a jury's inquiry as to parole in any way other than by a reasonably complete answer. The colloquy among the court, counsel, and the foreman of the jury (see slip opinion, pp. 25–27) illustrates the confusion that can result when a court attempts to circumvent the issue.

Speculation by a jury as to punishment would appear to be seriously objectionable only where it might conceivably influence a verdict in derogation of the doctrine of reasonable doubt—where, for example, a jury in a doubtful case might be persuaded to agree to a verdict of guilty under a belief that an advisory recommendation of mercy would affect a sentence.[25] But where there is not this danger of confusing the verdict with the punishment, and where the jury is given by statute the duty of fixing a mandatory punishment within its discretion, it is difficult to see how a jury can intelligently impose a sentence without full knowledge of the quantum of punishment involved. Regardless of whether the primary purpose of punishment is one of retribution, reform, or the protection of the public, a knowledge of length of incarceration is necessary.

In the instant case, the comments of the judge relative to sentence and parole could not have in any way influenced the jury in making its determination as to petitioner's guilt or innocence. The comments were

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[25] See Comment, 17 U. of Chi. L. Rev. 400, noting *Warford* v. *State*, 214 Ark. 423, 216 S. W. 2d 781. It should not be assumed, however, that jurors would thus disregard their oaths. See *United States* v. *Krulewitch*, 167 F. 2d 943, 950 (C. A. 2), reversed on other grounds, 336 U. S. 440; *United States* v. *Parker*, 103 F. 2d 857 (C. A. 3), certiorari denied, 307 U. S. 642. It is impossible to predict in a given case to what degree such speculation might protect rather than threaten a defendant's rights. For example, where a law requires a heavy sentence, and the jury knows it, there will be a greater likelihood of acquittal. See Comment, 17 U. of Chi. L. Rev., *supra*, at 405, fn. 20.

not made voluntarily as a part of the general charge before the jury retired to reach a verdict, as in *Lovely* v. *United States, supra,* 169 F. 2d 386 (C. A. 4);[26] they could not therefore have had the initial effect of beclouding the issue. Moreover, there is every reason to believe, from the tenor of the questions asked by the deliberating jury, that the jury had already disposed of the question of guilt or innocence and was then concerned only with punishment.

The jury undoubtedly wished to make certain that at no future date would petitioner be released into society. This was the result it thought just and

[26] State decisions make a distinction between information volunteered in the charge and information responsive to a query. *Jones* v. *State*, 161 Ark. 242, 255 S. W. 876; *Freeman* v. *State*, 156 Ark. 592, 247 S. W. 51; *State* v. *Carroll*, 52 Wyo. 29, 69 P. 2d 542. In *State* v. *Carroll*, *supra*, it was said (69 P. 2d at 563): "A voluntary statement on the part of the trial court referring to the power of the Board of Pardons, or to the pardoning power of the Governor, might make the jury believe that the statement has been made for the express purpose of calling such power to their attention and thus might have a tendency to influence them in their verdict. Such voluntary statement should, accordingly, not be made, although, as already shown, some of the cases do not find it objectionable. We are not, however, able to perceive how any good purpose can be subserved by refusing to answer an inquiry of the jury. It would leave them in confusion and doubt, which would just as likely react against the accused as in his favor. We find that at least in some cases courts, in passing upon the point whether or not the trial judge should have made a statement to the jury, have pointed out that it was made in response to an inquiry, evidently deeming that of some importance. *Freeman* v. *State*, 156 Ark. 592, 247 S. W. 51; *Jones* v. *State*, 161 Ark. 242, 255 S. W. 876. While the jury may not know the details of reprieves, pardons and paroles, they, along with all ordinarily informed men, have a general knowledge of the subject."

proper. Under the statute, this result could of course be brought about by imposition of the death penalty, a matter left by Congress within the jury's discretion. But, possibly motivated by consideration for petitioner, the jury asked, in effect, if there was an alternative punishment which would accomplish the result it thought proper with less severity. It asked (*supra*, p. 8): "Can we the jury be assured that the defendant legally be imprisoned for the remainder of his natural life? No possibility of release * * * May the jury have a reading of the D. C. Code re: rape?"

The judge in his reply rigidly confined himself to stating concisely the law with respect to punishment for the crime. His answer was responsive, accurate, and objective in character. He stated simply that he could give no assurance that the defendant could, if found guilty, be imprisoned for the rest of his natural life. He explained that an indeterminate sentence was required, that the minimum term could be no more than a third of the maximum, that the maximum sentence was 30 years, and that at the end of the minimum sentence the Parole Board would have to decide whether the maximum or anything less should be served. Then, pursuant to the jury's request, he read the provision of the District of Columbia Code under which petitioner was being tried. The judge thus gave the jury the whole law with respect to the punishment for the crime without special emphasis of any kind.

We do not believe he could have done otherwise. As already pointed out, the jury's inquiry was one that had to be dealt with. And an answer without

explanation—for example, "I can give no such assurance"—or a refusal to answer at all would not have altered the situation.[27] Indeed, such a recourse could have caused confusion which the court might well have concluded would work to the prejudice of petitioner.[28]

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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[27] See the Fifth Circuit decision in *Krull* v. *United States* (*supra*, note 24); *Gaines* v. *Commonwealth*, 242 Ky. 237, 46 S. W. 2d 75; *State* v. *Dooley*, 89 Iowa 584, 57 N. W. 414.

[28] Petitioner made no objection to the court's instruction and suggested no alternative or supplemental charge. In a similar situation, where counsel made no objection to a court's indication that it would answer affirmatively a deliberating jury's inquiry as to whether it could recommend clemency, the failure of the judge to indicate that the jury's recommendation would not be binding has been held not to be plain error that would be noticed although not brought to the attention of the trial court. *United States* v. *Krulewitch*, 167 F. 2d 943, 950 (C. A. 2), reversed on other grounds, 336 U. S. 440; see Rules 30, 51, 52 (b), Federal Rules of Criminal Procedure.

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